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Supreme Court of the United States

OCTOBER TERM 1944

No. 1103

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased,

Petitioner,

against

READING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

HERBERT ZELENKO,
Counsel.

STEPHEN A. MACHCINSKI,
HAROLD L. SCHWARTZ,
of Counsel.

INDEX

PAGE

I—Jurisdiction 2

II—Opinions Below 2

III—Summary Statement 2

Question Presented 4

Reasons for Granting the Writ 5

ARGUMENT:

POINT I—The Courts below erred in sustaining the motion to dismiss the complaint upon the ground of no negligence shown. The case should have been submitted to the jury on the question of negligence 7

POINT II—Certiorari should be granted upon the authority of the case of Brady v. Southern Ry. Co. 13

POINT III—It is respectfully submitted that the writ of certiorari prayed for should be granted; that the decisions of the Circuit Court of Appeals and of the District Court be reversed with costs 14

CASES CITED

PAGE

Atchison, Topeka & Santa Fe R. Co. v. Toops, 281 U. S. 356, 50 S. Ct. 283, 74 L. Ed. 896 8

Blair v. Baltimore & Ohio R. R. Co., 65 Sup. Ct. 545 ..... 5, 13

Brady v. Southern Ry. Co., 64 Sup. Ct. Rep. 232 ..... 5, 13

Looney v. Metropolitan R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564 8

New Aetna Portland Cement Co. v. Hatt, 231 F. 611 8

Tennant v. Peoria and P. V. Railroad Co., 64 Sup. Ct. 499 ..... 5, 12

Tiller v. Atlantic Coastline R. Co., 65 Sup. Ct. 421 ..... 5, 9, 10, 12

Woodward v. So. Pac. Co., 94 Fed. (2d) 1028 9

STATUTES

Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) 1, 2, 4

Judicial Code, Sec. 240(a) (28 U. S. C. 347) 2

Supreme Court of the United States

No.

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased,

Petitioner,

against

READING COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Judges of the Supreme Court of the United States:

Petitioner, Grazia Fantini, prays that a writ of certiorari issue to review the decision of the United States Circuit Court of Appeals for the Third Circuit rendered February 12, 1945, affirming a judgment of the District Court for the District of New Jersey rendered March 22, 1944. The judgment dismissed petitioner's complaint on the merits. The complaint brought under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59), alleges the death of Grazio Fantini, petitioner's husband, due to negligence of respondent while in its employ.

The defense alleged in the answer (A16) and sustained by the District Court and the Circuit Court was that no negligence was proved.

I

Jurisdiction

Jurisdiction is based upon Section 240 (a) of the Judicial Code as amended; 28 U. S. Code 347.

The mandate of the Circuit Court of Appeals was stayed and withheld pending this application for a writ of certiorari in accordance with Rule 38 of the said Circuit Court of Appeals.

II

Opinions Below

The District Court directed a verdict for the respondent (A39), but filed no opinion.

The opinion of the Circuit Court of Appeals is not yet reported, but is annexed (A46).

III

Summary Statement

Plaintiff, Grazia Fantini, sued as administratrix of the estate of her deceased husband, Grazio Fantini, under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59) to recover damages for his death. At the conclusion of the plaintiff's case the Court directed a verdict in favor of the defendant to which ruling exception was duly taken (A39).

Plaintiff's intestate was a watchman employed by the defendant and had been so employed for about twenty-eight years. He was the husband of the plaintiff and left surviving him besides his widow, three children. For the entire period of his employment with the defendant company he had been stationed at a crossing known as the Tulpehocken Street crossing in West Reading, Pennsylvania. Tulpe-

hocken Street runs north and south and the railroad crosses it east and west (A23).

John A. Mell, who had been subpoenaed by both parties, testified for the plaintiff that he was employed by the Potteiger Company, whose plant was located on the southwest corner of the intersection of the railroad crossing at Tulpehocken Street.

On January 12, 1942, he was proceeding northward on Tulpehocken Street in the direction of his place of employment and the railroad crossing (A24). It was light and he had a clear view (A24). When he was about 200 feet from the crossing and approaching it he saw plaintiff's intestate at the crossing with his stop sign in his hand and facing south toward Mr. Mell. Mell knew plaintiff's intestate to be the watchman at that crossing, having seen him there before (A25).

As the witness neared the crossing and was about 30 feet from the south side of it he turned his automobile to the left to go into the yard of the Potteiger Company (A26). At that time he stopped his car and it was facing in a northwest direction (A26). He looked again in the direction of plaintiff's intestate and saw him still standing with his stop sign on the northwest side of Tulpehocken Street across the tracks (A26). The witness further testified that plaintiff's intestate was about 2 or 3 feet north of the northernmost rail at that time (A26).

At that time a train approached the crossing in an easterly direction and the witness first saw it as it emerged from view from behind the Potteiger Company building (A27). This building was located about 50 feet west of the crossing.

The witness glancing to his right then saw through the wheels of the locomotive, plaintiff's intestate flying through the air on the north side of the tracks (A28).

The witness did not remember whether or not a whistle had been blown at that time as the train was approaching the crossing (A27). The body of the deceased was flying

through the air in an easterly direction. The train although proceeding easterly, was on the westbound track, which was the north track. This was against the current of traffic and not on the usual track (A28). The speed of the train was between 30-40 miles an hour (A28). It did not slow down as it was approaching the crossing. After the accident it did not stop but proceeded on its way (A28).

The witness thereupon summoned aid and located the body of plaintiff's intestate across Tulpehocken Street on the northeast corner of the crossing about 5 or 6 feet from the northernmost rail (A28).

Grazia Fantini, the plaintiff, testified that her husband had been her sole support and at the time of his death he was earning approximately $24 a week, all of which was used to provide food, clothing and shelter for the family and that during 1941 (the year preceding his death) the deceased had received a total of $1,146 as wages from the defendant (A21).

At the conclusion of the plaintiff's case, the Trial Court granted respondent's motion to dismiss, stating in substance that no negligence was shown nor could a jury properly infer negligence. Thus the Trial Court ruled despite the theory of petitioner that the unusual movement of the train and the question of adequate warning of this unusual movement to the deceased was a question for the jury upon the facts and the presumptions. The Circuit Court of Appeals affirmed upon the ground of no negligence shown. These decisions were in direct conflict with the applicable law.

Question Presented

Under the Federal Employers' Liability Act (45 U. S. C. A., Secs. 51-59), was sufficient evidence of negligence furnished by the record to justify submission of the case to the jury?

Reasons for Granting the Writ

1. The decision in *Brady* v. *Southern Ry. Co.*, 64 Supreme Court Reporter 232 (1943), requires that in cases brought under the Federal Employers' Liability Act, the question whether sufficient evidence of negligence is furnished by the record to justify submission of a case to a jury must be determined by the Supreme Court, finally.

2. The decision of the Circuit Court of Appeals is in direct conflict with the decisions of the Supreme Court in the following cases:

Tiller v. *Atlantic Coastline R. Co.*, 65 Sup. Ct. 421.
Tennant v. *Peoria and P. V. Railroad Co.*, 64 Sup. Ct. 409.
Blair v. *Baltimore & O. R. Co.*, 65 Sup. Ct. 545.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Third Circuit commanding that Court to certify and to send to the Court for its review and determination on a day certain to be named therein, a full and complete transcript of the record and of the proceedings in the case numbered and entitled on its dockets "No. 8647, October Term, 1944, Grazia Fantini, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased, Plaintiff-Appellant vs. Reading Company, Defendant-Appellee", and that the decisions of the said Circuit Court of Appeals in the said case and of the District Court be reversed and that your petitioner have such other and further relief as in the premises may be just.

GRAZIA FANTINI,
By HERBERT ZELENKO,
Counsel.

STEPHEN A. MACHCINSKI,
HAROLD L. SCHWARTZ,
of Counsel.

Certificate

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of the Court and that it is not filed for the purpose of delay.

HERBERT ZELENKO,
Counsel.

ARGUMENT

POINT I

The Courts below erred in sustaining the motion to dismiss the complaint upon the ground of no negligence shown. The case should have been submitted to the jury on the question of negligence.

At the scene of the accident the tracks of the respondent run in an east and west direction. There is a double track, one eastbound and one westbound. Tulpehocken Street, which crosses the tracks runs in a north and south direction.

There is direct evidence that immediately preceding the accident, the deceased was standing on the north side of the crossing about 2 or 3 feet from the northernmost rail (A26). He was standing at a place where he was obliged and required to stand. He was facing directly south and holding in his right hand a stop signal for vehicular and pedestrian traffic (A26). There is direct evidence and a concession by the respondent that the train which struck the deceased was moving in an unusual manner. It was an eastbound train and it was on the westbound track. It traversed the crossing against the current of traffic. It was proceeding on the northerly track instead of on the southerly track. The southerly track was the usual track for eastbound trains (A28 to 37).

Obviously, the witness Mell was not in a position to see exactly which part of the engine struck the deceased, as it passed between him and the deceased at the time. Also, there appears to be a hiatus between the time when Mell saw the engine almost upon the crossing and when he next saw deceased's body being hurled through the air. There is nothing in the testimony of the witness Mell or in any other part of the record, which indicates that the deceased had moved in any way from the position which he had assumed long before the train approached the crossing

and in which he was seen almost instantaneously preceding the accident. There is a clear and conclusive inference that the body of the deceased or his right hand holding the stop sign was struck by some portion of the front end of the engine or some appurtenance thereon which overhung or extended northerly from the rail, as his body was seen through the drivers hurtling through the air (A28). However, even if it is contended that the direct evidence is insufficient to establish that the deceased was actually engaged in the performance of his duties at the time he was struck, he would be entitled to a presumption on that point. The absence of an eyewitness was not decisive. There was sufficient evidence to show that he was obliged to be at the point of the accident at the time thereof. To this evidence must be added the presumption that deceased was actually engaged in the performance of his duties and exercising due care for his own safety at the time of his death. *Looney* v. *Metropolitan R. Co.*, 200 U. S. 480, 488, 26 S. Ct. 303, 306, 50 L. Ed. 564; *Atchison, Topeka & Santa Fe R. Co.* v. *Toops*, 281 U. S. 356, 50 S. Ct. 283, 74 L. Ed. 896; *New Aetna Portland Cement Co.* v. *Hatt*, 6 Cir., 231 F. 611, 617.

The respondent had prescribed certain rules relating to signals to be given by trains when proceeding against the current of traffic (A34 et seq.). There is in evidence another rule of the respondent relating to the position to be assumed by a watchman when performing his duties at a crossing in relation to the current of traffic (A34).

Deceased had been employed by the respondent in the same capacity and in the same location, as a watchman, for over twenty-eight years and it is reasonable to infer that he had sufficient knowledge and experience to perform his duties properly; that he was acquainted with the dangers incident to his employment and that he was acquainted with the rules and regulations governing his job. It is also reasonable to infer that he was acquainted with the regular movements of the trains, of the tracks upon which they ran and with the regular or usual current of traffic.

A jury must determine the question of negligence from all of the evidence, including the presumptions. *Woodward* v. *So. Pac. Co.*, 94 Fed. (2d) 1028.

Upon the rule relating to the position to be taken by watchmen at a crossing, which required deceased to assume a place when practicable, near the opposite track from which a train was approaching and upon the evidence, including the proper presumption that the deceased was performing his duty and exercising due care for his own safety, a clear inference must result that the deceased anticipated and expected that the train involved in the accident was approaching the crossing on the usual or southerly track and not upon the unusual or northerly track near which he was standing.

The evidence clearly shows that the decedent took a position near the track where he was obliged to and by the rules of the company required to take when a train is approaching in the usual and customary way.

The fact that the train approached against the current of traffic clearly indicates that the deceased did not receive any notice or warning of the unusual movement. Whether or not a bell was rung or a whistle blown from the engine would not exonerate the respondent from its negligence. It was the respondent's duty knowing of the unusual movement of the train to warn the deceased by some means or device of the unusual condition even before the train arrived at a point where it was required to ring a bell or blow a whistle. Such signal from the engine, if it were given, would only go to the question of contributory negligence on the part of the decedent.

The recent case of *Tiller* v. *Atlantic Coastline R. Co.*, 65 Sup. Ct. 421, wherein there was involved the question of negligence in the unusual movement of a train, is strikingly applicable to the instant case. On pages 423, 424 of its opinion this Court stated:

> "An additional ground of the reversal of this cause by the Circuit Court of Appeals was that part of the District Court's charge to the jury set out in the

margin. It instructed the jury that if they believed that the back-up movement was an unusual and unexpected one, and a departure from the general practice in making up that particular train, and that Tiller had no reasonable cause to believe that such a movement would be made, it became the duty of the defendant to give him adequate warning of that movement and if the jury found that the defendant failed to perform this duty, and that failure was the proximate cause of the injury, its verdict should be for the plaintiff. The original complaint alleged this as one of the grounds of negligence. The Circuit Court of Appeals held that there was substantial testimony to support a finding that the movement was an unusual one. Nevertheless, because no railroad rule or custom prohibited such an unusual movement, because some of the evidence showed that the same movement had been performed on other occasions, and because Tiller was familiar with the local situation, the Circuit Court of Appeals held that the railroad owed no duty to warn him of such an unusual movement. We cannot say that a jury could not reasonably find negligence from the evidence which showed such an unprecedented departure from the usual custom and practice in backing cars, without giving 'adequate warning of the movement'. Compare Toledo, St. Louis & W. R. R. v. Allen, 276 U. S. 165, 171, 48 S. Ct. 215, 217, 72 L. Ed. 513. The charge of the District Court in this respect was correct."

In the present case and in the *Tiller* case the following similar questions were involved: The unusual movements of the train (in the instant case this unusual movement is conceded); the question as to whether the employee had cause to believe that such an unusual movement would be made; and the question as to whether he had received adequate warning of the unusual movement.

In footnote 3 of its opinion in the *Tiller* case, this Court sets forth a portion of the charge of the District Court and approves it. It reads, as follows:

"The Court charges the jury that if you believe from the evidence that Mr. Tiller was struck while the en-

gine and cars of the defendant were making a back-up movement on the night of March 20th, 1940; that such movement was an unusual and an unexpected one and a departure from the general practice followed in making up train No. 209; that Mr. Tiller on the occasion in question was working on or near the slow siding without knowing or having reasonable cause to believe that such a movement would be made, then it became and was the duty of the defendant in making such movement to give adequate warning of the same, and if the jury believe from the evidence that the defendant failed to perform such duty and as a proximate result of such failure, Mr. Tiller received the injuries from which he died, then the jury should return a verdict for the plaintiff."

It is petitioner's contention that her case should have been submitted to the jury upon like instructions.

There is testimony that for a distance of approximately 400 feet west of the crossing the track proceeds in a straight line (A33). The testimony is that it was light and clear on the day of the accident. A jury could reasonably infer that the deceased was clearly visible from the cab of the engine. The standard of care required of the respondent being greater under these unusual circumstances, negligence could be spelled out from the fact that the train did not slow down when it approached the crossing; that it crossed at the rate of about 30-40 miles an hour (A28) and that although the body of the deceased was hurtling through the air in front of the cabin the train did not stop, even after striking the deceased. The employees of the respondent, knowing they were travelling against the current of traffic, were obliged to use added caution and an added degree of care. The speed at which the train was proceeding under these unusual circumstances could be considered by the jury as a failure to use additional caution or care under the circumstances. Furthermore, in the instant case, the respondent failed to use even ordinary care. From the foregoing facts the jury could infer that no one on the engine kept a proper lookout, or else they would have seen the deceased. This was negligence.

There was no testimony as to whether or not the proper or any signal was given by the train when it approached the crossing. It cannot be said that the lack of evidence on this aspect of the case sustains the decisions of the courts below that this causes a failure of proof on the part of the plaintiff. The particular rule regarding the signal in these circumstances (A34) does not require the signal to be given at any particular distance from the crossing, but merely states that it must be given "when approaching". This, of course, leaves to the discretion of the engineer the time when the signal should be given. No one can say how far from the crossing would be considered an approach thereto. It might be five feet or five hundred feet.

Therefore, it was unnecessary for the petitioner to prove the failure of the respondent to give the required signal for the reason that whether or not the signal was given and whether or not there was any direct evidence by either party on this point it would still be a question of fact for the jury as to whether or not the signal or any other adequate warning was given in time for the deceased to proceed to a place of safety from the position of danger in which respondent had placed him by reason of his duties. *Tiller* v. *Atlantic Coastline R., supra.*

The trial court, in granting its motion to dismiss, selected its own conclusion as to the cause of the accident. In its discussion with respondent's counsel it stated (A37):

> "Mr. Gildea: As I say, there is no actual eye witness to the accident.
> The Court: He must have moved closer to the track.
> Mr. Gildea: Or he would not have been struck.
> The Court: The train did not make a detour."

Any determination upon the inferences and the evidence was a matter for the jury and this honorable court has so held in the case of *Tennant* v. *Peoria & P. U. Railroad Company,* 64 Supreme Court, 409 (1944) where, at page 412, the Court said:

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take

the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The total point of judicial review is the reasonableness of the particular inference of conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable. Washington & Georgetown R. Co. v. McDade, 135 U. S. 554, 571, 572, 10 S. Ct. 1044, 1049, 34 L. Ed. 1444. That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable."

See also *Blair* v. *Baltimore & Ohio R. R. Co.*, 65 Sup. Ct. 545.

The Trial Court as one of the reasons for its decision to dismiss the complaint made much of the fact that in the *Tennant* case, cited supra, there was a signal given. However, the Trial Court's reasoning which appears in the appendix at page 38 is contrary to the principle enunciated in the *Tiller* case, also cited supra, wherein this honorable Court holds that the question of adequate warning to the deceased was one for the jury. The Circuit Court of Appeals in its opinion erroneously followed the reasoning of the District Court.

POINT II

Certiorari should be granted upon the authority of the case of *Brady* v. *Southern Ry. Co.*

In the recent case of *Brady* v. *Southern Ry. Co.*, 64 Sup. Ct. 232, this honorable Court held that in all cases brought

under the Federal Employers' Liability Act, the question as to the sufficiency of the evidence of negligence must be decided by the Supreme Court in the final instance.

POINT III

It is respectfully submitted that the writ of certiorari prayed for should be granted; that the decisions of the Circuit Court of Appeals and of the District Court be reversed with costs.

Respectfully submitted,

HERBERT ZELENKO,
Counsel.

STEPHEN A. MACHCINSKI,
HAROLD L. SCHWARTZ,
of Counsel.

No. 1103

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IN THE

United States Circuit Court of Appeals

FOR THE THIRD CIRCUIT

No. 8647

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of GRAZIO FANTINI, deceased,
Plaintiff-Appellant,

vs.

READING COMPANY,
Defendant-Appellee.

APPELLANT'S APPENDIX

AND

PROCEEDINGS IN THE U.S. CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPEAL FROM JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY,
CIVIL ACTION No. 2967

JOHN J. CORCORAN, JR.,
Attorney for Appellant,
15 Exchange Place,
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and
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APPENDIX

I. **Docket Entries** 11

II. Complaint 12

III. Answer 16

IV. The Evidence 18

PLAINTIFF'S EVIDENCE

Grazia Fantini:
Direct 20

John A. Mell:
Direct 23
Cross 30
Redirect 31, 33
Recross 32

Motion for Directed Verdict 36

Exhibit P-1 (letters of administration) 40

Exhibit P-2 (statement of earnings of deceased) 42

APPENDIX

United States District Court

DISTRICT OF NEW JERSEY

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased vs. READING COMPANY	Civil 2967

Docket Entries

1943		
June	19	Complaint and Demand for jury trial filed
	19	Summons issued
	22	Summons returned served on Agent of defendant Company on June 21st, filed
July	9	Answer filed
	10	Notice fixing place for trial filed (Trenton)
1944		
Feb.	29	Pre-trial Conference
Mar.	21	Trial with Jury—Motion for directed verdict granted. Verdict in favor of defendant (Forman)
	22	Judgment in favor of the defendant, Reading Co., and against Grazia Fantini, Admx. with costs entered (Notice sent attorneys)
Apr.	21	Notice of appeal to USCCA, filed
	21	Copy of notice of appeal mailed to George Gildea, Esq. & to the Clerk of USCCA
May	2	Stipulation as to contents of Record on Appeal, filed

Complaint

UNITED STATES DISTRICT COURT

DISTICT OF NEW JERSEY.

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased, Plaintiff, vs. READING COMPANY, Defendant.	Civil Action No.

Plaintiff, residing in the Borough of West Reading, in the State of Pennsylvania, complaining of the defendant says:

1) That heretofore and prior to the commencement of this action, the plaintiff was duly appointed Administratrix of the goods, chattels and credits which were of Grazio Fantini, deceased, by the Register for the Probate of Wills and Granting Letters of Administration in and for the County of Berks, State of Pennsylvania.

2) That at all the times hereinafter mentioned, the defendant was and still is a steam surface railroad corporation, organized and existing under and by virtue of the laws of the State of Pennsylvania, and was and still is doing business within the jurisdiction of this Court.

3) That at all the times hereinafter mentioned, the defendant carried passengers and freight for hire from the State of Pennsylvania to other states and from other states to the State of Pennsylvania, and at all the times herein mentioned was engaged in the business of interstate commerce.

4) That this action is brought under the Federal Employers' Liability Act.

5) That heretofore and at all the times hereinafter mentioned, the defendant maintained, operated and controlled a certain railroad at or near Tulpehocken Avenue and Lebanon Valley Grade Crossing in the Borough of West Reading, State of Pennsylvania, which contained the defendant's switches, tracks, rails, roadbeds, sidings, crossings, booths and shanties, over, through and upon which the defendant operated locomotives, engines and trains under its control.

6) That on information and belief, on or about the 12th day of January, 1942, Grazio Fantini, plaintiff's intestate, was employed by the defendant as a crossing watchman at or about Tulpehocken Avenue and Lebanon Valley Grade Crossing in the Borough of West Reading, State of Pennsylvania, and it was his duty to protect and control the movement of traffic and persons over the said grade crossing, all in the furtherance of the defendant's business of interstate commerce.

7) That on information and belief, on or about the 12th day of January, 1942, plaintiff's intestate was employed by the defendant as a crossing watchman at or about Tulpehocken Avenue and Lebanon Valley Grade Crossing in the Borough of West Reading, State of Pennsylvania, and was engaged in the defendant's business of interstate commerce.

8) That on information and belief, at all the times herein mentioned, it was the custom and practice and it was the duty of plaintiff's intestate, while so employed as aforesaid, that upon receiving a signal in the watchman's booth of the approach of a train from a particular direction, the plaintiff's intestate was obliged to and did assume a posi-

tion on the opposite side from the direction in which a train was proceeding.

9) That on information and belief, on or about the said time as aforesaid, while plaintiff's intestate was employed by the defendant at the place as aforesaid, and while plaintiff's intestate was performing his duties in his usual manner, and after receiving a signal in the watchman's booth of the approach of an eastbound train, assumed his position in the usual and customary manner, when by reason of the negligence and carelessness of the defendant, its agents, servants and employees and without any fault or negligence on the part of the plaintiff's intestate contributing thereto, the said train, without giving plaintiff's intestate any signal or warning, proceeded on the westbound track and against the current of traffic, and struck plaintiff's intestate, causing him to sustain the severe injuries which resulted in his death on February 2nd, 1942.

10) That upon information and belief, the said accident was caused wholly and solely through the negligence and carelessness of the defendant, its agents, servants and employees, and not through any fault or negligence on the part of the plaintiff's intestate contributing thereto.

11) That on information and belief, at the said time and place hereinbefore mentioned, the defendant, its agents, servants and employees were negligent and careless in that they negligently and carelessly operated and controlled the said train; in that they negligently and carelessly operated the said train at an excessive rate of speed; in that they negligently and carelessly and improperly permitted the said train to be operated and run against the current of traffic; in that they negligently and carelessly failed to give the proper signals and warnings to plaintiff's intestate of the unusual movement of the said train; in that they negli-

gently and carelessly failed to provide plaintiff's intestate with a safe place in which to work and to maintain the same in a reasonably safe condition; in that the defendant was negligent and careless in other respects.

12) That as a result of the above mentioned premises plaintiff's intestate was so severely injured that he died on February 2nd, 1942 as a result of the said injuries.

13) That plaintiff's intestate left him surviving a widow, Grazia Fantini, and four (4) children, his next of kin, who have forever lost and been deprived of his aid, support, advice and comfort, and that the widow has further been deprived of her deceased husband's consortium, all to their damage in the sum of Seventy-five Thousand and 00/100 ($75,000.00) Dollars.

WHEREFORE, plaintiff demands judgment against the defendant in the sum of Seventy-five Thousand and 00/100 ($75,000.00) Dollars, besides the costs and disbursements of this action.

JOHN J. CORCORAN, JR.,
Attorney for Plaintiff,
Office & P. O. Address,
15 Exchange Place,
Jersey City, New Jersey.

Demand for Jury Trial

The Plaintiff demands a trial by Jury of the issues raised by the complaint.

JOHN J. CORCORAN, JR.,
Attorney for Plaintiff.

Answer

UNITED STATES DISTRICT COURT

DISTRICT OF NEW JERSEY.

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, deceased, Plaintiff, vs. READING COMPANY, Defendant.	Civil Action File No. 2967

The defendant, a corporation organized and existing under the laws of the State of Pennsylvania and having its principal office in the City of Philadelphia in said State, answering the complaint of the plaintiff says that:

1. The defendant has no knowledge or information sufficient to form a belief as to the allegations of paragraph 1 and leaves the plaintiff to her proof thereof.

2. Paragraph 2 is admitted.

3. Paragraph 3 is admitted.

4. The defendant denies that the plaintiff has a cause of action against it under the Federal Employers' Liability Act.

5. The defendant admits that at the times mentioned in the complaint it operated and controlled a railroad which crossed Tulpehocken Avenue in West Reading, Pennsylvania, and that it operated locomotives, engines and trains over said railroad. The other allegations of paragraph 5 are denied.

6. The defendant admits that on or about January 12, 1942, Grazio Fantini, the plaintiff's intestate, was employed by it as a crossing watchman at the above mentioned Tulpehocken Avenue crossing in West Reading, Pennsylvania, and that he was engaged in interstate commerce at said time and place and that it was his duty to give warning to the traveling public of the approach of trains over said railroad. The other allegations of paragraph 6 are denied.

7. The defendant admits that the plaintiff's intestate was employed as a crossing watchman at the crossing above mentioned on January 12, 1942, and was engaged in interstate commerce.

8. Paragraph 8 is denied.

9. Paragraph 9 is denied.

10. Paragraph 10 is denied.

11. Paragraph 11 is denied.

12. Paragraph 12 is admitted.

13. The defendant has no knowledge or information sufficient to form a belief as to the dependents, if any, surviving the decedent and leaves the plaintiff to her proof thereof. The other allegations of paragraph 13 are denied and the defendant denies that the plaintiff is entitled to damages from it in the sum mentioned in the complaint, or in any other sum.

FIRST SEPARATE DEFENSE

The defendant denies that it was guilty of any negligence causing or contributing to the injuries and death of

the plaintiff's intestate and says that said injuries and death were caused or contributed to by the negligence of said intestate in that he failed to use reasonable care to observe and heed the approach of the train by which he was struck, placed himself unnecessarily in a position of danger, and was otherwise negligent.

GEORGE GILDEA
KATZENBACH, GILDEA & RUDNER
Attorneys for Defendant

The Evidence

(Filed May 2nd, 1944)

Before HONORABLE PHILIP FORMAN, DJ, and a Jury on March 21, 1944, at Trenton, NJ

APPEARANCES:

JOHN J. CORCORAN, JR., Esq., for the Plaintiff; HERBERT ZELENKO, Esq., of Counsel

KATZENBACH, GILDEA & RUDNER, Esqs., by GEORGE GILDEA, Esq., for the Defendant

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Mr. Corcoran: Prior to the drawing of the jury, your Honor, I would like to make a motion, an application for the admission of Mr. Herbert Zelenko, a member of the bar of the State of New York, and the Southern District of the United States District Court, and former Assistant United States Attorney for the Southern District, to appear pro hac vice in this cause.

The Court: All right, in this cause, Mr. Zelenko.

Mr. Zelenko: Thank you, Judge.

The Court: Please draw a jury in the case of Fantini against the Reading Company.

(A jury was impaneled, examined on voir dire, and sworn.)

(Mr. Zelenko opened the case to the jury on behalf of the plaintiff.)

(Mr. Gildea opened the case to the jury on behalf of the defendant.)

Mr. Zelenko: At this time, if your Honor please, the plaintiff offers in evidence the appointment of Mrs. Fantini as the administratrix of the Estate of Grazio Fantini and Mr. Gildea has kindly consented that we put an ordinary Clerk's copy in and not a copy that has been exemplified.

Mr. Gildea: That is right, we consent, your Honor.

(Copy of appointment of Grazia Fantini as Administratrix received in evidence and marked Exhibit P-1).

Mr. Zelenko: I will call Mrs. Fantini. We have provided for an interpreter, if your Honor please.

The Court: All right. Do we absolutely have to have an interpreter? She doesn't speak English?

Mr. Zelenko: Yes, I believe it is necessary, Judge.

The Court: All right.

(To the witness): Do you understand any English at all?

The Witness: No.

The Court: How long have you been in this country?

The Witness: 22.

The Court: Can't you tell me in English?

The Witness: No.

The Court: No. All right.

Mr. Zelenko: She does have great difficulty.

The Court: All right, maybe we can get along faster. Have you agreed on the interpreter?

Mr. Gildea: Oh, yes, we certainly agree on Mr. Plumeri.

Mr. Zelenko: Mr. Gildea courteously supplied the interpreter, and we agreed to him.

The Court: All right, swear the interpreter.

(Joseph Plumeri sworn as interpreter.)

Grazia Fantini, sworn through the interpreter, called on her own behalf, testified as follows through the Interpreter:

Direct examination by Mr. Zelenko.

Q. Mrs. Fantini, what is your address? A. West Reading.

Q. Are you the widow of Grazio Fantini, who was a watchman on the Reading Railroad? A. Yes.

Q. Who was hurt in an accident in January of 1942 and died in February of that year? A. The 2d of February.

Q. And at the time of the accident had you been living with your husband? A. When he died, he died at the hospital.

Q. No, what I want is, he had been living together with you and your family? A. Yes.

Q. Now, how old was he at the time of his death, Mrs. Fantini? A. 52 years old.

Q. How old are you, Mrs. Fantini? A. 51 years.

Q. Now, do you have any children? A. Yes.

Q. Will you give me the name and the age of the oldest child first? A. Antonio Fantini, 22 years old.

Q. What does he do? A. He is in the Army.

Q. He is the boy who is in the court room here? A. Yes.

Q. What is the name and the age of the next child? A. A. Alfred Fantini, 19 years old.

Q. What does he do? A. He is also in the Army.

Q. Is he here or overseas? A. I don't know.

Q. What is the name and the age of the third child? A. Pasquale Fantini.

Q. How old is he? A. 17 years.

Q. Where is he? A. In the Army.

Q. Now, what is the name and age of your fourth child? A. Yolando Fantini, 13 years of age.

Q. She is the little girl that is in the court room, is she? A. Yes.

Q. Now, the whole family lived together in your one house, is that right? A. Yes.

Q. Now, at the time of your husband's death do you know exactly how much he was earning?

Mr. Zelenko: Pardon me, Mr. Interpreter. Mr. Gildea, have you the exact amount?

Mr. Gildea: Yes.

Mr. Zelenko: Will the Court bear with me a moment?

The Court: Yes.

(Counsel confer off the record.)

Q. Do you know about how much he was earning at the time of his death? A. $24.00 a week.

Q. What did he do with the money? A. He used to provide for the food, the clothing, the home, the family.

Q. Did he ever use any of that money for himself? A. No, it was not sufficient.

Mr. Zelenko: Now, if your Honor please, at this time Mr. Gildea has given me the exact amount of earnings for the year before the death of the plaintiff, and with the Court's permission I should just like to read the figures.

The Court: All right.

Mr. Zelenko: I am through with oral questions of this witness.

The Court: All right.

Mr. Zelenko: Do you wish to inquire before I read this or shall I read it now?

Mr. Gildea: Why don't you offer it in evidence instead of reading it?

Mr. Zelenko: I at this time would offer in evidence this paper.

The Court: Does it average something?

Mr. Zelenko: It doesn't average, it is a total; it averages about a little less than $100.00 a month.

The Court: All right.

Mr. Zelenko: Is that about right, Mr. Gildea?

Mr. Gildea: The figures for each month——

Mr. Zelenko: For the year 1941 there is a total of $1146.00.

Mr. Gildea: That is right.

Mr. Zelenko: And I believe it would be a little less than $100.00 a month.

The Court: All right.

Mr. Zelenko: I think I will dispense with this. Well, I will mark it in evidence.

(Sheet showing earnings of Grazio Fantini received in evidence and marked Exhibit P-2.)

Mr. Zelenko: That is all, I think, of this witness, your Honor.

The Court: Any cross, Mr. Gildea?

Mr. Gildea: I think not, your Honor.

The Court: All right. That is all, Mrs. Fantini.

The Witness (in English): O.K., thanks.

Mr. Zelenko: At this time, the plaintiff calls Mr. John Mell.

JOHN A. MELL, called on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination by Mr. Zelenko

Q. Mr. Mell, you are here pursuant to a subpoena which was served on you by the plaintiff, is that right? A. That is right.

Q. And you also received a subpoena from the defendant? A. That is right.

Q. Mr. Mell, where do you live, sir? A. I live in Sunny Creek Mills, Pennsylvania.

Q. That is Sunny Creek Mills, Pennsylvania? A. That is right.

Q. What is your occupation? A. Carpenter.

Q. In January 1942 by whom were you employed? A. Potteiger Company.

Q. And where was that company located, I mean give me the town first? A. In West Reading.

Q. And on what street was it? A. Tulpehocken Street.

Q. Now, is that located near a railroad crossing, the company? A. Yes, sir.

Q. And for how many years or months before January 1942 had you been employed by this company? A. About 2 years.

Q. In the line of your going to work or duty it was necessary, was it, for you to go to the company most every morning? A. No, not every morning, just once in awhile.

Q. You had occasion to go there a number of times during the 2 years you worked there, is that right? A. That is right.

Q. Now, I just want this so you can give us a picture. Tulpehocken Street, does that run north and south? A. North and south.

Q. And the railroad crosses it east and west, is that right? A. That is right.

Q. Now, when you would come to work from which direction would you come to the crossing near where the company was located? A. I would be traveling north on Tulpehocken.

Q. Why, was your company located right about at the railroad crossing? A. That is right.

Q. As you were going north on the crossing on which side of the street was the company's office, on your right or left? A. On the left side, the west side.

Q. Was it necessary for you to cross the railroad tracks to get into the company office? A. No, sir.

Q. So that would be on the southwest side, and you made that trip many times, did you not, going along Tulpehocken Street to the office of your company? A. Yes, that is right.

Q. Now, did you ever have occasion to see if any little building was located on the right hand or southeast corner of the railroad crossing? A. Yes, sir.

Q. What was that? A. That was a watchman's box.

Q. One of those little— A. Shanties.

Q. Shanties. Now, do you remember the morning of January 12, 1942? A. I do.

Q. Before going into that, Mr. Mell, across the railroad track on the north side were there any buildings? A. Not close to the railroad.

Q. Now, do you remember whether or not Tulpehocken Street on the other side of the railroad was level or whether it was not level, did it have a grade to it? A. It had a sharp grade downhill.

Q. A downhill grade from the railroad? A. That is right.

Q. Now, on that morning you were going to work, were you at the Potteiger Company? A. That is right.

Q. And you came into Tulpehocken Street? A. That is right.

Q. Do you remember whether it was light or dark at that time? A. It was just a little past daybreak, it was light, light enough to see.

Q. It was light. When you first came into that street about how far were you from the railroad crossing? A. About 200 feet.

Q. You were going way down the block, is that right? A. That is right.

Q. When you came into that street, was there any traffic up and down the street if you remember? A. No traffic.

Q. And did you have occasion to look toward the tracks and toward your company while you were driving? A. That is right.

Q. And did you see anybody near or about the tracks? A. I seen Mr. Fantini standing along the track with his stop sign in his right hand.

Q. He was the only person you saw at that time? A. That is right.

Q. Had you ever seen that man before? A. Yes, sir.

Q. And, as far as you knew, he was the watchman at that place, is that right? A. That is right.

Q. Now, this was when you were about 200 feet from the crossing when you first saw him? A. That is right.

Q. Now, could you see when you at that distance on which side of the tracks he was, whether he was on the south or the north side when you were about 200 feet from him? A. I didn't see it then; I seen him when I stopped at the approach.

Q. When you got nearer? A. That is right.

Q. You do recall seeing him with his stop sign down near the tracks when you first turned into the street? A. That is right.

Q. Do you recall what he was doing at the time you first saw him? A. He was just standing there with his stop sign (illustrating).

Q. He was standing? A. That is right.

Q. Do you recall whether or not he was facing you? A. He was facing me.

Q. Now, your car proceeded towards the Potteiger Company and toward the crossing, is that right? A. That is right.

Q. What happened as you got near the crossing, what did you do? A. I turned to the left to turn into the yard of the Potteiger Company.

Q. When you say you turned to the left, on the street, did you continue to have your car in motion or did you stop the car? A. I stopped.

Q. And that was stopped right on the street? A. On the street.

Q. Facing left? A. That is it.

Q. Was it facing left directly or was it at an angle? A. A slight angle.

Q. Now, as you got nearer to Mr. Fantini and to the tracks did you have occasion to see him again? A. I did.

Q. Where was he standing then when you got nearer? A. He was standing on the northwest corner past the tracks.

Q. On the other side of the track? A. That is right.

Q. What was he doing? A. Standing there with his stop sign (illustrating).

Q. He was still holding the stop sign. Now, was he in the center of the roadway of Tulpehocken Avenue on the north side of the crossing or was he on either side of it? A. He was on the northwest side.

Q. And that was the position you had seen him in originally? A. Yes, that is right.

Q. Now, from where you were could you tell about how many feet he was from the last rail on the north side? A. Between 2 and 3 feet.

Q. Of course you were on the south side and you couldn't measure it exactly, could you? A. No.

Q. Now, your car at that point was stopped facing left, is that right? A. That is right.

Q. What took place then? A. Well, the train come out from back of the Potteiger building; I looked over my right shoulder and through the wheels of the locomotive I seen Mr. Fantini flying through the air.

Q. When you say that the train came from back of the Potteiger building, from which direction was it coming? A. From the west.

Q. And it was going— A. East.

Q. Now, about how far from the crossing, how far to the left of the crossing will you say the building of the Potteiger Company starts? Give us an approximate idea. A. About 50 feet, something like that.

Q. And is it a one or two-story building? A. Two-story.

Q. You saw the train coming from west to east and you first saw it as it came past the building line, is that right? A. That is right.

Q. By the way, were there any gates at that crossing? A. No gates.

Q. When you were coming down the street as you had on many occasions before did you have occasion to look at the blinker lights? A. I don't remember if the blinkers were lit or not.

Q. But you do know there were blinker lights there? A. That is right.

Q. Do you know just where on the crossing those blinker lights were located? A. The one on the south side is to the right and the one on the north side is to the left.

Q. Near where Mr. Fantini was standing? A. That is right.

Q. You say you don't remember whether or not they were on that morning? A. I don't remember.

Q. Now, do you know whether or not or did you hear a whistle blow that morning as the train was coming to the crossing? A. I don't remember that.

Q. Were you paying any attention to whether or not the whistle was blowing? A. No.

Q. Now, as the train came past the crossing you say you saw Mr. Fantini? A. That is right.

Q. Through the wheels of the locomotive, and what did you see at that point? A. As the locomotive passed the corner I seen Mr. Fantini flying through the air between the boiler of the locomotive and the wheels.

Q. That was on the side that was away from you, on the north side? A. That is right.

Q. And in which direction was his body flying at that time? A. It was flying towards the east.

Q. Now, on which track was that train coming? A. On the westbound track.

Q. It was going east on the westbound track? A. That is right.

Q. And that is the north track, is that right? A. That is the north track.

Q. Now, can you tell us about—you have driven a car, haven't you? A. Yes.

Q. And you have ridden on trains? A. Yes, sir.

Q. Can you give us an idea about how fast that train was going according to your estimate? A. Between 30 and 40 mile an hour, I would estimate.

Q. Now, as the train was passing the crossing did it slow it down? A. No, sir.

Q. What happened to the train? A. The train kept right on going.

Q. It didn't stop at all, did it? A. No, sir.

Q. Now, what did you do when you saw the body hurtling through the air? A. I left my car set and I ran into the office of the Potteiger Company to get help.

Q. Did you get help? A. I got three or four men, I don't remember.

Q. When you came out did you locate Mr. Fantini's body? A. That is right.

Q. Now, can you tell us just where it was when you found it? A. It was across the, lying across Tulpehocken Street on the east side nearer some kind of a signal board.

Q. In other words, it was all the way across Tulpehocken Street? A. That is right.

Q. On the north side of the crossing? A. That is right.

Q. And where was it lying in respect to the tracks? A. About 6 feet away from the last rail, 5 to 6 feet.

Q. North of it? A. North of it, north of the rail.

Q. Near that signal box? A. That is right.

Q. You say the train at that time had continued on its way? A. That is right.

Q. Had you ever seen that train pass before that morning about that time? A. Well, close to that time, I don't know just what time.

Q. Was it a passenger or freight train? A. It was a passenger train.

Q. It came by about the same time each morning? A. That is right.

Q. You didn't arrive at work each morning, did you, at the same time? A. No, sir.

Q. Do you know on which track it would come by on the mornings other than this morning? A. I wouldn't know.

Q. Now, when you came to work on these other mornings before the train came had you ever seen Mr. Fantini standing the way you saw him on January 12th? A. I have seen him standing there several times, but I don't know just where because——

Mr. Zelenko: Will the Court bear with me one moment, please?

The Court: Yes.

Q. Mr. Mell, I want to see you if you can recall whether or not that blinker was working that morning? A. I don't remember that because I was not interested to cross the tracks.

Mr. Zelenko: That is all at this time.

Cross-examination by Mr. Gildea.

Q. Mr. Mell, as you approached the crossing on Tulpehocken Street were you traveling upgrade? A. Down grade.

Q. You were traveling down grade? A. Yes.

Q. At the point where you turned in from Tulpehocken Street to Potteiger's plant, is that higher than the railroad or lower? A. At one point it is higher.

Q. Did you have your headlights on that morning? A. I don't think I did.

Q. Do you think that it was so light that you didn't need your headlights? A. That is right.

Q. When you first saw Mr. Fantini at the crossing was that as you turned in from some other street into Tulpehocken Street? A. No, when I was traveling north on Tulpehocken I seen him standing.

Q. How many times did you see Mr. Fantini standing at the crossing before you saw him flying through the air, once or twice? A. Well, I seen him there lots of times.

Q. I mean on this particular morning. A. I seen him standing when I approached, when I was traveling north on Tulpehocken Street and when I went to turn to my place of employment he was standing at the same spot.

Q. I see. You didn't pay particular attention to how close he was to the track, did you? A. No, I didn't.

Q. He may have been 2 feet, he may have been 3 feet, he may have been 8 feet from the tracks, so far as you know, isn't that right? A. That is right.

Mr. Gildea: Excuse me just a moment, your Honor.

The Court: All right.

Mr. Gildea: We have a rather perplexing problem, your Honor. Is your Honor going to have a recess soon?

The Court: Yes.

Mr. Gildea: We would like to have a moment to consider what we are going to do about a certain phase of the case.

The Court: Well, you ladies and gentlemen may retire for five minutes.

(After short recess.)

Mr. Gildea: I am through with Mr. Mell, your Honor.

Redirect examination by Mr. Zelenko.

Q. Mr. Mel, I just have another question or two. You wouldn't say that Mr. Fantini was as far as 8 feet away from that north track, would you?

Mr. Gildea: That is objected to as not proper redirect examination.

Mr. Zelenko: I believe in answer to one of Mr. Gildea's questions Mr. Gildea said would you say 3, 4 or about 8 feet away?

The Court: Yes.

Mr. Zelenko: It is in regard to that I am inquiring.

Mr. Gildea: He is your witness, Mr. Zelenko; you can't cross-examine him.

Mr. Zelenko: Well, Mr. Gildea, I believe I am entitled to inquire, you having asked the question, I believe the witness is entitled to explain that.

The Court: How far did you say Mr. Fantini was away from the north rail?

The Witness: From 2 to 3 feet, that is what I said the first time.

The Court: Yes, go ahead.

Mr. Zelenko: That is what I want, that is the answer I want.

The Court: All right.

Recross-examination by Mr. Gildea.

Q. You also said on cross-examination that you hadn't taken any particular notice of the distance, it might have been as much as 8 feet, didn't you? A. I didn't say that.

Q. Didn't you say it might have been as much as 8 feet on your cross-examination? Don't you remember that, Mr. Mell? A. I don't remember that.

Q. Well, it is true, isn't it, it might have been 5, 6, 7 or 8 feet as far as you can tell? A. That would have been on the opposite side of the blinker light, 7 to 8 feet.

Q. As you came up to this crossing, you didn't make——

The Court: Mr. Gildea asked you whether it might have been 2, 5 or even 8 feet, and I understood you to say yes on cross-examination. Maybe you didn't understand it.

The Witness: Well——

The Court: Do you remember that?

The Witness: I remember it now but I am sure it was between 2 and 3 feet where the man was standing.

Q. What makes you so sure? A. Because if it would be much farther than that he would be on the opposite side of the blinker light.

Q. How far is the blinker light from the track? A. I don't know. It may be 5 feet from the track.

Q. What you mean to tell us is this, he was not any farther away from the track than the blinker light, is that right? A. He was between the blinker light and the track.

Q. Between the blinker light and the track, and that is as near as you can tell us? A. That is right.

Q. How long was it that you saw Mr. Fantini in this position where you have just said he was, how long after that was it that you saw him flying through the air? A. It was just a few seconds.

Q. Just a few seconds. Did you see the locomotive before Mr. Fantini was struck? A. I seen the locomotive come out from behind the building, and then I looked over my right shoulder and just like that he was hit.

Q. You couldn't tell us how far the train was from the crossing when you last saw Mr. Fantini before he was hit, could you? A. It was pretty close.

Q. Pretty close to the crossing? A. Yes, sir.

Mr. Gildea: That is all, your Honor.

The Court: Anything else, Mr. Zelenko?

Mr. Zelenko: I just have another question.

Redirect examination by Mr. Zelenko.

Q. When you look west on that track, did you ever look west on the track from the crossing? A. Yes, sir.

Q. That goes straight away for some distance, doesn't it? A. Some distance, yes.

Q. About how many feet would you say or how many yards? A. Maybe 400 feet.

Q. And then there is a curve, isn't there? A. That is right.

Q. And does that curve north or curve south? A. It curves north.

Q. So that there is a curve from the north to a distance of about, you say about 400 feet from the crossing westerly and then it is about straight? A. That is right.

Mr. Zelenko: That is all. Thank you, Mr. Mell.

Mr. Gildea: That is all.

Mr. Zelenko: At this time, if your Honor please, I should like to read into evidence the rule, one of the rules for the maintenance of way of the Reading Company, the defendant. Mr. Gildea has graciously consented to let me read from one of his copies.

The Court: All right.

Mr. Zelenko: This rule appears under the heading: "Crossing Watchmen. Crossing watchmen"—the rule is numbered 167 and it is subdivision C, that is the third part of the rule, "Where there are two or more tracks the watchmen will when practicable take a position near the opposite track from the one on which a train, engine or motor car is approaching where they can best warn the highway traffic of a train, engine, or motor car approaching on the other track. They shall under no circumstances signal by hand or otherwise for highway vehicles to cross the track."

At this time I believe the defendant will also concede, your Honor, that they have a rule that states when a train is approaching a crossing against the current of traffic they have a particular signal whistle, I believe it is a long and short whistle, but, in any event, it is a special signal for that circumstance, is that right, Mr. Gildea?

Mr. Gildea: I will show you the rule.

Mr. Zelenko: Very well.

I will read the rule particularly.

The Court: All right. It is rule number what?

Mr. Zelenko: Well, this appears under rule No. 14, subdivision q.

The Court: Of what?

Mr. Gildea: Operating rules.

Mr. Zelenko: General operating rules.

It says: "When approaching, when running against the current of traffic, 1, approaching stations, curves or other points where view may be obscured", and it tells the particular type of signal which must be given in that situation.

Mr. Gildea: It is one long and one short blast.

Mr. Zelenko: Yes, one long and a short. There is a straight line for a long signal and a circle for a short signal, I believe that is the code.

Mr. Gildea: Yes.

Mr. Zelenko: At this time, Mr. Gildea, perhaps you can direct my attention to the rule requiring the particular signal when a train approaches a crossing, whether against or with the current of traffic.

Mr. Gildea: A regular crossing signal.

Mr. Zelenko: Yes.

Mr. Gildea: Here it is (indicating).

Mr. Zelenko: At this time, if your Honor please, I should like to read into evidence also under rule 14 of the Operating Rules of the Reading Company, subdivision L, which requires two long and two short blasts of the whistle be given when the train is approaching public crossings at grade.

Mr. Gildea: That is right.

Mr. Zelenko: I have one more offer for evidence, your Honor, and that is I should like to read the expectancy table for a person 52 years of age as 19.49 years.

Mr. Gildea: What table is it, please?

Mr. Zelenko: That is the American Experience Table of Mortality.

Mr. Gildea: All right.

Mr. Zelenko: With that the plaintiff rests, your Honor.

The Court: All right.

Mr. Gildea: I would like to make a motion, your Honor.

The Court: All right.

I shall let the jury go to lunch now.

Mr. Gildea: Yes, sir.

The Court: You may retire, ladies and gentlemen. Don't talk about the case either among yourselves and, of course, with no one else.

Suppose you come back at half-past one. It will give us an hour on the motion.

Mr. Gildea: Yes, sir.
The Court: And an hour for lunch.
Come back at one-thirty. You may retire now.
(Jury retired.)

(In Chambers)

Mr. Gildea: If your Honor please, I move for the direction of a verdict in favor of the defendant upon the ground that there is no evidence of negligence on the part of the defendant.

The testimony shows, I believe, that the plaintiff's intestate was struck by a train operated in an easterly direction over the westbound track of the Reading Company at Tulpehocken Street in West Reading, Pennsylvania, some time between 7:45 and 8 o'clock on the morning of January 12, 1942; that he was seen at the crossing with his banner in his hand, apparently protecting traffic. It also appears from the evidence that when a train is operating against the current of traffic the rules require that a signal by a long blast and a short blast of the whistle be given as the engine approaches a curve or as it passes another train.

It also appears from the evidence from the rules of the company that when a locomotive approaches a grade crossing it is the duty of the engineer to sound two long and two short blasts of the whistle but there is absolutely no evidence in the case that those signals were not given. The only witness aside from the plaintiff who was called by the plaintiff testified that he doesn't remember whether or not the whistle was blown. So there is an absolute lack of any evidence to the effect that the engineer failed to give the signals which the rule requires.

There is testimony as to where the plaintiff's intestate was standing which places him ultimately some place within 5 feet of the track. There is evidence that there was a

curve some 400 feet or so to the west of the crossing. There is no evidence to the effect that the plaintiff's intestate didn't move closer to the track after he was last seen by Mr. Mell before he was struck. As I say, there is no actual eyewitness to the accident.

The Court: He must have moved closer to the track.

Mr. Gildea: Or he would not have been struck.

The Court: The train didn't make a detour.

Mr. Gildea: No.

The Court: It didn't go off the track.

Mr. Gildea: So it seems to me, your Honor, that there is no evidence of negligence that would justify the submitting of the case to the jury and that your Honor should direct a verdict for the defendant.

The Court: What is there in this business of the train going against the current of traffic?

Mr. Gildea: That is not negligence.

The Court: It is admitted that it was?

Mr. Gildea: Yes, it is admitted that it was.

(After argument.)

The Court: The evidence that counsel puts forward as supplying the jury with the right to infer that the signal was not given here or that if it was given it was given too late or——

Mr. Zelenko: —improperly given——

The Court: —that it was improperly given—if it was given too late it would be improperly given.

Mr. Zelenko: Perhaps it was not sounded exactly right; it may have been a long and a short or a short and a long. I am not saying it was.

The Court: The evidence on that is that the train was concededly on a track running against the current of traffic —it is unusual in that respect; that there was a rule that in such case the signal should be given when it was running against the current of traffic; that there is a presumption that the decedent was in the exercise of his duties and

was taking reasonable care of himself. Those things are established factually and by presumption.

Now, counsel says from that the jury could go back and infer one of the contingencies of liability, namely, that the signal was not given or that it was given too late or improperly, and I can't agree that any such basis is laid by the kind of proof that is adduced in this case. It seems to me that there is not the kind of testimony that was present in the Tennant case. In the Tennant case there is a concession that no signal was given, and the controversy revolved around whether the rule required a signal to be given. Once it became the law, either by the court or by the jury, that there was a rule requiring the signal then the absence of signal was established and liability was established.

In the Tennant case, of course, there is also other testimony.

In the McGuin case we have the testimony of the witness Miller which laid a factual basis which made it possible for the jury to draw a logical inference, but here I think we have a case which comes in the category where the plaintiff is unfortunate enough not to be able to prove that the respondent was negligent and that such negligence was the proximate cause in whole or in part of the factual accident, and I am taking into consideration all of the argument that testimony does not have to be a direct piece of evidence that negligence was involved, that there might be circumstantial evidence and that there might be legitimate inferences, but here it seems to me I would leave the jury in a state where it would have to go off surely into the realm of speculation as to whether there was or was not negligence on the part of this defendant.

I don't see anything else under the circumstances but to grant the motion, which I do reluctantly because this is the inherent wrong of the law here which is not an out and out workmen's compensation act.

A man who had worked twenty-eight years on this railroad, given his services for all that time, and who had been killed through no wilful misconduct certainly should have his economic situation straightened out and his dependents cared for to some extent, but it is not for this Court to legislate an appropriate compensation act for these workers. That is the responsibility of some other department of the Government, which to date, in my experience, has failed in that respect.

(Further colloquy.)

(In the Court Room)

The Court (to the jury): It has become necessary, after listening to a legal argument in this case, to grant a motion for a direction of the verdict, which is a formal proposition, in favor of the defendant in the case, and that, so to speak, takes the matter from your hands, decides it on a question of law.

So the jury is directed in this case to find a verdict in favor of the defendant of no cause for action, and if it is agreeable we will consider that the jury has rendered such a verdict.

Mr. Zelenko: I respectfully except.

The Court: And you have an exception, which is granted on the record.

Exhibit P-1

I, Chester R. Deiger, Register for the Probate of Wills and granting Letters of Administration in and for the County of Berks.

To: Grazia Fantini, widow of Grazio Fantini, deceased, late of the Boro. of West Reading, Pa., died Feb. 2, 1942, Greetings:

Whereas the said Grazio Fantini lately died intestate (as is affirmed) having whilst he lived, at the time of his death divers, goods, chattels, rights and credits within the said County, by means whereof the full disposition and power of granting the administration of all and singular the goods, chattels, rights and credits which were of the said deceased within the said County and also the auditing, accounts, calculations and reckonings of the said administration and final dismission from the same to me is manifestly known to belong, I desiring that the goods, chattels, rights and credits of the said deceased may be well and truly administered do hereby grant unto you, the said Grazia Fantini in whose fidelity in this behalf I very much confide, full power by the tenure of these presents, to administer the goods, chattels, rights and credits which were of the said deceased within the said County; and also to ask, collect, levy, recover and receive the credits whatsoever of the said deceased which at the time of his death were owing to him, did in any way belong and to pay the debts in which the said deceased stood obliged, so far forth as the goods, chattels, rights and credits will extend according to their rate and order of law, especially of well and truly administering the goods, chattels, rights and credits of the said deceased and making a true and perfect inventory thereof and exhibiting the same into the Register's Office at the City of Reading, in the County of Berks, within thirty days next ensuing, and render a true and just account, calculation and reckoning of the said Administration at the expiration of six months from the date thereof.

Exhibit P-1

And also I do by these presents ordain, constitute and appoint you the said Grazia Fantini Administratrix of all and singular the goods, chattels, rights and credits which were of the said deceased, within the limits aforesaid saving harmless and forever indemnifying me and all other officers against all persons whatsoever by reason of your administration aforesaid, and saving to all others their rights as well and truly observing the law relative to Collateral, Direct, Transfer and Inheritance.

In testimony whereof I have hereunto set my hand and seal of Office at Reading, the 11th day of May, in the year of Our Lord 1943.

Chester R. Deiger,
Register
per O. D. Luik,
Deputy Register

Exhibit P-2

19156

GRAZIO FANTINO

1941		
	Jan.	$ 100.92
	Feb.	99.52
	Mar.	100.82
	April	98.04
	May	90.72
	June	77.76
	July	82.18
	Aug.	96.48
	Sept.	92.16
	Oct.	109.65
	Nov.	87.84
	Dec.	110.43
		$1146.52
1942		
	Jan.	$ 42.32
	Back Pay	72.36
		$ 114.68
	TOTAL	$1261.20

[fol. 43] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8647

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits Which Were of Grazio Fantini, Deceased, Appellant,

vs.

READING COMPANY

And afterwards, to wit, the 8th day of December, 1944, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Albert B. Maris, Honorable Herbert F. Goodrich and Honorable Gerald McLaughlin, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the 12th day of February, 1945, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

[fol. 44] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8647

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits Which Were of Grazio Fantini, Deceased, Plaintiff-Appellant,

v.

READING COMPANY, Defendant-Appellee

Appeal from the District Court of the United States for the District of New Jersey

Before Maris, Goodrich and McLaughlin, Circuit Judges

OPINION OF THE COURT—Filed February 12, 1945

By McLAUGHLIN, Circuit Judge:

Appellant's intestate had been a crossing watchman in the employ of the Reading Company. On January 12, 1942,

while engaged in the performance of his duties at the Tulpehocken Street crossing, West Reading, Pa., he was struck and instantly killed by a locomotive attached to a train of the appellee. Suit was started for damages for his death under the Federal Employers' Liability Act. At the conclusion of the plaintiff's case, on motion for the defendant, the Court directed a verdict in favor of the defendant on the ground that there was no evidence of negligence on the part of the defendant. The appellant contends that the case should have been submitted to the jury on this question. [fol. 45] Tulpehocken Street runs north and south. The railroad tracks cross it from east to west. The only witness testifying for the plaintiff was John A. Mell who was proceeding by automobile north on Tulpehocken Street towards the railroad crossing. About 200 feet from the crossing he saw the now deceased at the crossing, with his stop sign in his hand and facing south. About 30 feet from the crossing Mell started turning in to a yard on his left. At that time Fantini was standing with his stop sign on the northwest side of Tulpehocken across the tracks about two or three feet north of the most northerly rail. At the same time a train approached the crossing from the ~~east.~~ West The next thing Mell saw was Fantini flying through the air. The locomotive and the cars it was pulling, though proceeding east, were on the westbound track. Mell estimated its speed as between 30 and 40 miles an hour. He did not remember whether or not a whistle had been blown as the train approached the crossing. The only other testimony offered in connection with the accident were three company rules. These had to do with: where a crossing watchman should stand; the signal to be given when running against traffic and approaching stations, curves or other points where view may be obscured; and the regular crossing signal to be given when a train approaches a crossing.

The right of action conferred by the Federal Employers' Liability Act rests upon requisite proof of the employer's negligence as to the proximate cause of the employee's injury or death. Barry v. Reading Company, — F. 2d —, (C. C. A. 3), confirmed on rehearing — F. 2d —. In Tennant v. Peoria and Pekin Union Railroad, 321 U. S. 29, which is cited by the appellant, the Supreme Court stands firmly on that same principle. In that case it was not disputed that the rule, requiring an engine bell to be rung

when an engine was about to move, had been violated. See also the latest expression of the Supreme Court on this question in Blair v. Baltimore & Ohio R. Co., — U. S. —, decided January 29, 1945. In Sweeting v. Pennsylvania R. [fol. 46] Co., 142 F. 2d, 611 (C. C. A. 3) also referred to by the appellant, there was an element of res ipsa loquitur present, in addition to a direct inference of negligence from the testimony.

In this case there is nothing before us but the sad fact that this unfortunate accident did occur. With no proof of any negligence on the part of the appellee, the judgment must be affirmed.

Affirmed.

A true Copy: Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 47] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1944

No. 8647

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits Which Were of Grazio Fantini, Deceased, Appellant,

vs.

READING COMPANY

Present: Maris, Goodrich and McLaughlin, Circuit Judges.

On appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

By the Court, Gerald McLaughlin, Circuit Judge.

February 12, 1945.

Endorsements: Order Affirming Judgment. Received and Filed Feb. 12, 1945. Wm. P. Rowland, Clerk.

[fol. 48] UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, Sct.:

I, Wm. P. Rowland, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appendix to Appellant's Brief, as constituting the portions of the Record before this Court at argument; and proceedings in this Court, in the case of Grazia Fantini, Administratrix, etc. vs. Reading Company, No. 8647, on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 19th day of March in the year of our Lord one thousand nine hundred and forty-five and of the, Independence of the United States the one hundred and sixty-ninth.

Wm. P. Rowland, Clerk of the U. S. Circuit Court of Appeals, Third Circuit. (Seal.)

Office - Supreme Court, U. S.
FILED
APR 27 1945
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1944. No. 1103

GRAZIA FANTINI, as Administratrix of the Goods, Chattels and Credits which were of Grazio Fantini, Deceased,

Petitioner,

against

READING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

GEORGE GILDEA,
Attorney for Respondent.

KATZENBACH, GILDEA & RUDNER,
Of Counsel.

International, 236 Chestnut St., Phila. 6, Pa.

INDEX TO BRIEF.

	Page
ARGUMENT	1
Point (1). There Being No Evidence of Negligence the Trial Court Properly Directed a Verdict for the Respondent	1
Point (2). Certiorari Should Be Denied in This Case	5

CASES CITED.

	Page
B. & O. R. Co. v. Berry, 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098	3
Brady v. Southern R. Co., 64 S. Ct. 232, 88 L. Ed. 189	5
D. L. & W. R. Co. v. Koske, 279 U. S. 7, 49 S. Ct. 202, 73 L. Ed. 576	3
Looney v. Metropolitan R. R. Co., 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564	4
N. O. & N. E. R. Co. v. Harris, 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167	3
N. Y. Central R. Co. v. Ambrose, 280 U. S. 484, 50 S. Ct. 198, 74 L. Ed. 562	3
St. Louis & San Francisco Ry. Co. v. Mills, 271 U. S. 344, 46 S. Ct. 520, 70 L. Ed. 979	3
Stewart v. Southern Rwy. Co., 315 U. S. 283, 62 S. Ct. 616, 86 L. Ed. 849	4
Tennant v. Peoria & Pekin Union Rwy. Co., 64 S. Ct. 409, 88 L. Ed. 322	3

IN THE

Supreme Court of the United States.

October Term, 1944.

No.

GRAZIA FANTINI, AS ADMINISTRATRIX OF THE GOODS, CHATTELS AND CREDITS WHICH WERE OF GRAZIO FANTINI, DECEASED,

Petitioner,

against

READING COMPANY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI.

ARGUMENT.

Point (1).

There Being No Evidence of Negligence the Trial Court Properly Directed a Verdict for the Respondent.

The petitioner's intestate was employed by the respondent as a crossing watchman at the Tulpehocken Street crossing in West Reading, Pennsylvania. He was struck by a passenger train a little after daybreak on January 12, 1942. (A 24, 29) The train was traveling in an easterly direction on the westbound track. (A 28) It was cliamed in the complaint and at the trial that the respondent was negligent in that it failed to warn the decedent of the approach of the train. Rules of the respondent with respect to signals by whistle were offered in evidence. One rule requires that when running against the current of traffic

one long and one short blast of the whistle of the locomotive shall be blown approaching stations, curves or other points where the view may be obscured. This is rule No. 14 (A 34). The same rule requires the sounding of two long and two short blasts of the whistle when a train is approaching public crossings at grade. (A 35)

The only witness who was asked about the blowing of the whistle testified as follows (A 27):

> "Q. Now do you know whether or not or did you hear a whistle blow that morning as the train was coming to the crossing?
>
> A. I don't remember that.
>
> Q. Were you paying any attention to whether or not the whistle was blowing?
>
> A. No."

There was no testimony from which the jury could have found that the signals required by the rules were not given.

It is now contended by the petitioner that, regardless of what signals were given as the train approached the crossing, the engineer and the fireman or one of them should have seen the decedent either standing in a position too close to the track for safety, or moving toward the track, and should have done something to prevent the engine from striking him. Just what they could have done is not made clear.

There was no evidence that either the engineer or fireman saw the deceased in a place of danger. There was no evidence as to what the decedent did after he was seen by the witness Mell standing two or three feet north of the track, or how close the locomotive was when he assumed that position. Mell said it was "pretty close" to the crossing when he saw Fantini in that position. (A 32, 33) There was no evidence that he did not move closer to the track and no evidence of how far the engine overhung the track.

There was no evidence as to what the fireman was doing as the train approached the crossing. There was no evidence that he was not tending the fire in the locomotive. There was uncontradicted evidence that the accident happened on the fireman's side of the engine. (A 26, 27)

There was no evidence that it was possible for the engineer to see Fantini when the latter was in an unsafe place. The tracks curved to the north about 400 feet west of the crossing. (A 33) What view the engineer had of the north side of the crossing does not appear. Certainly it was not shown that Fantini was in a place of danger at any time when the engineer could have seen him.

There was no evidence that the train which was traveling between 30 and 40 miles an hour (A 28) could have been stopped before Fantini was struck if he had been standing in a place of danger, and had been seen standing there as soon as it was possible for either the engineer or fireman to see him.

It has been held consistently by this Court that in an action under the Federal Employers' Liability Act the burden of proving negligence rests upon the plaintiff. *St. Louis & San Francisco Ry. Co. v. Mills,* 271 U. S. 344, 46 S. Ct. 520, 70 L. Ed. 979; *N. O. & N. E. R. Co. v. Harris,* 247 U. S. 367, 38 S. Ct. 535, 62 L. Ed. 1167; *B. & O. R. Co. v. Berry,* 286 U. S. 272, 52 S. Ct. 510, 76 L. Ed. 1098; *D. L. & W. R. Co. v. Koske,* 279 U. S. 7, 49 S Ct. 202, 73 L. Ed. 576; *N. Y. Central R. Co. v. Ambrose,* 280 U S. 484, 50 S. Ct. 198, 74 L. Ed. 562.

In the recent case of *Tennant v. Peoria & Pekin Union Rwy. Co.,* 64 S. Ct. 409, 88 L. Ed. 322, Mr. Justice Murphy said:

> "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Tiller v. Atlantic Coast Line R. Co., 318 US 54, 67, 87 L. Ed. 610, 617, 63 S. Ct. 444, 143 ALR

967. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose case is attacked.' Galloway v. United States, 319 US 372, 395, 87 L. Ed. 1458, 1473, 63 S. Ct. 1077; Atchison, T. & S. F. R. Co. v. Toops, 281 US 351, 74 L. Ed. 896, 50 S. Ct. 281."

The contention that in a death case negligence can be inferred because of the presumption that the decedent exercised reasonable care for his own safety has been rejected by this Court. In *Looney v. Metropolitan R. R. Co.*, 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564, this Court affirmed a judgment entered on a verdict directed by the trial judge in favor of the defendant. The question was whether or not there was any proof of negligence. Mr. Justice McKenna, in the opinion for this Court, said:

"But the negligence of a defendant cannot be inferred from a presumption of care on the part of the person killed. A presumption in the performance of duty attends the defendant as well as the person killed. It must be overcome by direct evidence. One presumption cannot be built upon another."

In the case of *Stewart v. Southern Rwy. Co.*, 315 U. S. 283, 62 S. Ct. 616, 86 L. Ed. 849, a workman received fatal injuries when he went between two cars to adjust a coupler. There was a lever on one of the cars designed to be used in lifting the coupler pin and opening the knuckle. The engineer of the crew testified that he did not see the decedent attempt to use the pin lifter but did see him go between the cars. The administratrix of the decedent contended that,

"in the absence of evidence on behalf of the respondent, as to the condition of the coupler, the jury were

entitled to infer that the pin lifter was not in working order, otherwise the foreman, an experienced man, would not have gone between the cars and opened the coupler by hand."

The Court refused to sustain this contention.

The petitioner having had the burden of proving negligence on the part of the respondent, and having produced no evidence of negligence, the Court properly directed a verdict for the respondent, and the Circuit Court of Appeals did not err in affirming the judgment.

Point (2).

Certiorari Should Be Denied in This Case.

Petitioner claims that in the case of *Brady v. Southern R. Co.*, 64 S. Ct. 232, 88 L. Ed. 189, this Court held that in *all* cases brought under the Federal Employers' Liability Act, the question as to the sufficiency of the evidence of negligence *must* be decided by this Court in the final instance. It is clear that all the Brady case holds is that whether or not there is sufficient evidence to justify the submission to a jury of a case under the Federal Employers' Liability Act, is a federal question. In that case the Chief Justice said, "Only by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." Certainly it was not held that this Court *must* grant certiorari in every case under the Federal Employers' Liability Act where it is contended by the plaintiff that there was a jury question or by the defendant that there was not such a question.

It is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

GEORGE GILDEA,
Attorney for Respondent.
KATZENBACH, GILDEA & RUDNER,
Of Counsel.